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Lewis M. Simes

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By LEWIS M. SIMES*

A variety of legal devices are open to those who desire to impose private restrictions upon the use of land.[1] Among these are the covenant running with the land at law, the equitable servitude and the easement. However, this paper is concerned with two other legal devices which have been widely used in American law, namely, the right of entry for breach of condition and the possibility of reverter. The subject of our inquiry is presented by the following question: *Are rights of entry and possibilities of reverter appropriate devices to restrict land use in California?*[2]

The right of entry—sometimes called the right of entry for breach of condition, right of entry for condition broken, right of re-entry, or power of termination[3]—is the interest created in the grantor when he

* A.B., 1909, Southwestern Coll.; Ph.B., 1912, J.D., 1914, Univ. of Chicago; J.S.D., 1927, Yale Univ., LL.D., Southwestern Coll.; Professor of Law Emeritus, Univ. of Michigan; Professor of Law, Hastings College of the Law.

[1] This paper concerns only restrictions on land use created by acts of interested parties. It is, of course, possible to have restrictions on land use arising solely by operation of law. Examples of these would be the zoning ordinance, and the rules of the common law prohibiting the removal of lateral support of land or the commission of nuisance.

[2] In general, on the subject of restricting land use by the right of entry or possibility of reverter, see the following: HAMMOND, *Limitations Upon Possibilities of Reverter and Rights of Entry*, CURRENT TRENDS IN STATE LEGISLATION 589 (1954); MACELVEN, *Private Restrictions and Controls*, CALIFORNIA LAND SECURITY AND DEVELOPMENT 565 (CONT. ED. BAR 1960); SIMES & TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 201 (1960); 1954 Proceedings, SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW 4 (A.B.A. 1954); Brake, *Fees Simple Defeasible: the Purpose They Serve with an Appraisal of Their Utility*, 28 KY. L.J. 424 (1940); Clark, *Limiting Land Restrictions*, 27 A.B.A.J. 737 (1941); Ferrier, *Determinable Fees and Fees upon Conditions Subsequent*, 24 CALIF. L. REV. 512 (1936); Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248 (1940); Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees*, 27 TEX. L. REV. 158 (1948).

[3] The term "power of termination" is used in the RESTATEMENT, PROPERTY § 24, comment *b* (1936) to designate this interest. This is because the owner of such an interest has a power and not a right, and because it is not necessary for him to exercise this

conveys an estate in land on a common law condition subsequent. While a right of entry can arise on a conveyance for life or for years,[4] we are here concerned only with the case where the conveyance is in fee simple. Thus, *A*, the owner in fee simple, may make a conveyance "to *B* and his heirs, but upon the express condition that, if *B* or his successor in interest should ever use the land for anything but residence purposes, the grantor may enter and terminate the estate granted." Here *A* has a right of entry for breach of condition; *B* has a fee simple on condition subsequent. A possibility of reverter is the interest left in the grantor who conveys land in determinable fee simple (otherwise called a fee simple on a special limitation.) Thus, *A*, the owner in fee simple, may make a conveyance "to *B* and his heirs so long as the land is used for residence purposes." *A* has a possibility of reverter; *B* has a determinable fee simple. Both the right of entry and the possibility of reverter can be created only in the grantor, if created by deed; or only in the heirs of the testator, if created by will.[5]

The right of entry is distinguished from the possibility of reverter in that, upon the happening of the condition or limitation named in the creating instrument, the fee simple does not automatically terminate.[6] The one having the right of entry must elect to forfeit the estate conveyed. Originally this was accomplished by an actual entry upon the land. But today, in most jurisdictions, including California,[7] no entry is necessary; a mere action to recover the possession or to compel a reconveyance from the grantee, is sufficient to constitute an election. On the other hand, in the case of the possibility of reverter, the determinable fee terminates automatically and without any election to forfeit, the instant the event named in the creating instrument occurs.

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power by an actual entry on the land. As to this usage, see Parry v. Berkeley Hall School Foundation, 10 Cal. 2d 422, 426, 74 P.2d 738, 740, 114 A.L.R. 562, 564-65 (1937). The interest of the owner of a right of entry has sometimes erroneously been called a right or possibility of reverter, merely because, upon the election to forfeit, title will revest in such owner. For this usage, see Taylor v. Continental So. Corp., 131 Cal. App. 2d 267, 280 P.2d 514 (1955).

[4] In that case there would be a reversion in the grantor as well as a right of entry. RESTATEMENT, PROPERTY § 155, comment *c* (1936).

[5] It is, of course, possible to create a fee simple subject to a divesting condition in favor of a third party, but the third party has an executory interest, which, unlike the right of entry or possibility of reverter, is subject to the rule against perpetuities.

[6] For California cases recognizing this distinction, see Henck v. Lake Hemet Water Co., 9 Cal. 2d 136, 140, 69 P.2d 849, 851 (1937); Taylor v. Continental So. Corp., 131 Cal. App. 2d 267, 276, 280 P.2d 514, 520 (1955).

[7] Firth v. Los Angeles Pac. Land Co., 28 Cal. App. 399, 152 Pac. 935 (1915); RESTATEMENT, PROPERTY § 24, comment *b* (1936), Special Note; SIMES & SMITH, FUTURE INTERESTS § 255 (1956).

Objects in Imposing Restraints

Before taking up, one by one, the characteristics of these devices which render them adaptable or unadaptable to the creation of restraints on land use, we must first determine what is the object sought in imposing restraints. Only thus can it be ascertained whether the various characteristics of these interests make them suitable for the restrictions desired.

Objectives sought in restraining land use are, of course, varied. A grantor may wish to make a gift to a charitable corporation to be effective if and only if a particular use is made of the land. In other words, he wishes to make a gift with strings on it. In that case, either of these devices is perfectly adapted to his purpose.[8] Thus he may convey to the *X* Church, its successors and assigns, so long as the land is used for church purposes. In so doing he has created a determinable fee in the church and a possibility of reverter in himself. The instant the named use ceases, the fee simple revests in the grantor or his successor in interest. The same thing may be accomplished effectively by the right of entry, the difference being that the grantor or his successor in interest must elect to forfeit when the condition of using the land for church purposes is broken.

Or the grantor may desire to impose particular standards of moral conduct upon his grantee. Thus the land may be conveyed on a condition subsequent against its use for the sale or manufacture of alcoholic liquors.[9] Again the same thing may be accomplished by the possibility of reverter. Here, also, the right of entry or possibility of reverter seems to give the grantor a satisfactory device to accomplish his purpose.

More often than not, however, a grantor creates a right of entry of this sort, not for the purpose of imposing high ethical standards as such, but to maintain the economic value and continued enjoyment of other land which he retains in the neighborhood.[10] The right of entry may be conditioned on the construction or operation of a railway,

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[8] An example of such a condition is found in Papst v. Hamilton, 133 Cal. 631, 66 Pac. 10 (1901).

[9] See Burdell v. Grandi, 152 Cal. 376, 92 Pac. 1022, 125 Am. St. Rep. 61, 14 L.R.A.(n.s.) 909 (1907), where the general principle is recognized, but under the peculiar facts before the court, the condition was void because its purpose was to create a monopoly. In Townsend v. Allen, 114 Cal. App. 2d 291, 250 P.2d 292 (1952), although the trial court found that the condition was intended to benefit land retained, the appellate court suggested that it would have been valid had its purpose been to enforce the standards of morality of the grantor.

[10] See Parry v. Berkeley Hall School Foundation, 10 Cal. 2d 422, 74 P.2d 738, 114 A.L.R 562 (1937) (probably for the benefit of land retained but the opinion does not specifically state); Townsend v. Allen, 114 Cal. App. 2d 291, 250 P.2d 292 (1952).

which is expected to benefit the grantor's land.[11] In these situations it is not so clear that the devices are fully adapted to the purpose. For, as is subsequently indicated,[12] it may not be easy to have ownership of the right of entry accompany ownership of the tract retained.

However, by far the most common purpose in employing one of these land use restrictions is to maintain uniform standards for the benefit of all tracts in a given subdivision. The subdivider may be in the process of selling a large number of contiguous lots. Use restrictions are sought, requiring each lot owner to build only one single dwelling on his lot, of at least a certain minimum value, and located at least a certain number of feet back of the front line of the lot. Other provisions may seek to regulate the planting of trees and shrubbery, the location of fences, and the height of all structures. It is not uncommon to find such restrictions in the form of covenants, inserted in all deeds of conveyance of subdivision lots or embodied in a recorded declaration to which all deeds refer. Then such provisions may be followed by a declaration that all such restrictions are also conditions. Thus the following clause, though not ideal draftsmanship, may be regarded as typical:[13]

> [A] breach of any of the restrictions, provisions, conditions and covenants hereinbefore referred to shall cause the real property upon which said breach occurs to revert to said owners or their successors in interest as owners of the reversionary rights herein provided for, and the owners of such reversionary rights shall have the right of immediate re-entry upon said real property in the event of any such breach. . . ."

The purpose of the subdivider is normally to impose all restrictions on each lot in the subdivision for the benefit of every other lot which has already been purchased or which will be purchased in the future.

Thus, we may limit and rephrase the question previously proposed as our subject of inquiry, as follows: *Are rights of entry and possibilities of reverter appropriate devices to restrict California land use in a subdivision development?* We shall endeavor to answer this ques-

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[11] In the following cases a condition subsequent requiring the operation of a railroad on land conveyed was recognized as enforceable: Rosecrans v. Pacific Elec. Ry., 21 Cal. 2d 602, 134 P.2d 245 (1943); Liebrand v. Otto, 56 Cal. 242 (1880); Faus v. Pacific Elec. Ry., 146 Cal. App. 2d 370, 303 P.2d 814 (1956); Firth v. Los Angeles Pac. Land Co., 28 Cal. App. 399, 152 Pac. 935 (1915). In none of them is it expressly stated that the condition was for the benefit of land retained by the grantor, but this is inferable or is implied.

[12] See subdivision 4, *infra*, in which the question of the persons who can enforce the restriction is considered.

[13] This language is taken from that contained in the instrument litigated in the case of Childs v. Newfield, 136 Cal. App. 217, 219, 28 P.2d 924, 925 (1934).

tion by considering, one by one, those characteristics of the two devices which throw light on our problem.

1. What Kinds of Uses May Be Restricted by These Devices?

A wide variety of rights of entry which restrict land use have been recognized by the California courts.[14] Doubtlessly the same sort of use restraints may be imposed by possibilities of reverter; although very few cases involving such interests can be found.[15] Indeed, practically the only qualification to the proposition that any land use may be restrained by a right of entry or possibility of reverter is that the restraint must not be against public policy. Clearly, the usual types of forfeiture restraints which are imposed in connection with conveyances of lots in subdivisions are recognized as valid. Thus, in *Strong v. Shatto,*[16] the court held valid certain conditions subsequent which limited the use of the premises to residence purposes only, and prescribed the nature, quality and cost of buildings to be erected thereon. In its opinion, this statement is made:[17]

> Respondent's counsel concede, as we understand their argument, that the conditions and reservations are precisely such as have been upheld by the courts of this state in numerous decisions . . . [citing cases].[18] These authorities establish the doctrine that such conditions of forfeiture are not against public policy. . . .

Following the decisions of the Supreme Court of the United States, restrictions on the use of land by members of a particular race are unenforceable because any enforcement by the courts would violate the Fourteenth Amendment to the Federal Constitution.[19] And it is conceivable that there might, in rare instances, be other conditions sub-

[14] See generally 14 CAL. JUR. 2d *Covenants, Conditions and Restrictions* (1954), particularly §§ 56 and 126 of that title. Apparently, however, language in the form of a right of entry or possibility of reverter, giving the grantor an option to repurchase, might be construed as creating an option, and, therefore, subject to the Rule Against Perpetuities. Alamo School Dist. v. Jones, 182 Cal. App. 2d 180, 8 Cal. Rptr. 272 (1960).

[15] The first California decision expressly recognizing the possibility of reverter is Dabney v. Edwards, 5 Cal. 2d 1, 53 P.2d 962 (1935).

[16] 45 Cal. App. 29, 187 Pac. 159 (1919).

[17] *Id* at 31, 187 Pac. at 160.

[18] The court cited four cases. Expressly declaring such conditions as these are valid is Firth v. Marovich, 160 Cal. 257, 116 Pac. 729 Ann. Cas. 1912 D, 1190 (1911), one of the cases cited.

[19] See Shelley v. Kraemer, 334 U.S. 1, (1948); Barrows v. Jackson, 346 U.S. 249 (1953), 4 HASTINGS L.J. 57 (1952); 1 U.C.L.A.L. REV. 98 (1953). The California Supreme Court had at one time taken the position that, although a restraint on the alienation of real property to the members of a particular race is void, a restraint on the use by members of a particular race was valid. Los Angeles Inv. Co. v. Gary, 181 Cal. 680, 186 Pac. 596, 9 A.L.R. 115 (1919). Such a restraint on use is now void under Cal. Stat. 1961, cc. 1078, 1877, 36 CAL. S. BAR J. 668 (Sept.-Oct., 1961).

sequent which would be against public policy. Thus, it was held that a condition inserted in conveyances of all lands in a given neighborhood, except those retained by the grantor, prohibiting the sale of alcoholic liquors on the land conveyed, was void as against public policy, where its purpose was to give the grantor a monopoly in the sale of alcoholic liquors on land retained by him.[20] Lord Coke once declared that, if a man make a conveyance in fee upon condition that the grantee shall not take the profits of the land, the condition is void.[21] Without doubt a court would so hold, if such a deed should ever come before it; but, so far as the writer knows, no such conveyance has ever been litigated.

2. *What Is the Effect of the Doctrine That the Law Abhors a Forfeiture?*

It is generally recognized that the courts dislike forfeitures, and this doctrine is commonly applied to the divesting of ownership by rights of entry and possibilities of reverter.[22] This attitude has been manifested in three ways: (a) the court has construed language to create a covenant or as mere surplusage; (b) the court has construed the scope of the condition or limitation very narrowly, thus reaching the conclusion that no breach has occurred; or (c) the court has found that, although there is a condition and it has been broken, the grantor is barred from enforcing a forfeiture because of waiver, estoppel or changed circumstances.

Both in California and in other jurisdictions[23] courts have gone very far in refusing to find that the language of an instrument creates a right of entry or possibility of reverter. Thus California courts have indicated that: "[N]o provision in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction."[24] Moreover, they have

[20] Burdell v. Grandi, 152 Cal. 376, 92 Pac. 1022, 125 Am. St. Rep. 61, 14 L.R.A.(n.s.) 909 (1907).

[21] 2 COKE ON LITTLETON § 206b (1832). Also *Sheppard's Touchstone*, 131 (1820).

[22] See SIMES & SMITH, FUTURE INTERESTS §§ 248, 256 (1956). If the choice is between construing language as creating a right of entry or a possibility of reverter, the former construction is preferred. RESTATEMENT, PROPERTY § 45, comment *m* (1936).

[23] For discussion of California cases to this effect see 7 HASTINGS L.J. 101 (1955). Examples of such cases in other jurisdictions where the word condition was expressly used, or where forfeiture was expressly provided for, are the following: Post v. Weil, 115 N.Y. 361, 22 N.E. 145, 5 L.R.A. 422, 12 Am. St. Rep. 809 (1889); W. F. White Land Co. v. Christenson, 14 S.W.2d 369 (Tex Civ. App., 1928); President & Fellows of Middlebury College v. Central Power Corp. of Vermont, 101 Vt. 325, 143 Atl. 384 (1928).

[24] Hawley v. Kafitz, 148 Cal. 393, 394, 83 Pac. 248, 249 (1905). Similar language is found in Rosecrans v. Pacific Elec. Ry., 21 Cal. 2d 602, 134 P.2d 245 (1943); Behlow v. Southern Pac. R.R., 130 Cal. 16, 62 Pac. 295 (1900); Cullen v. Sprigg, 83 Cal. 56, 23 Pac. 222 (1890); Hasman v. Union High School, 76 Cal. App. 629, 245 Pac. 464 (1926).

cited the following provision of the California Civil Code in support of this proposition: "A condition involving a forfeiture must be strictly interpreted against the person for whose benefit it is created."[25] Thus, a mere statement of purpose is not sufficient to create a condition.[26] Nor is the statement of something as the consideration for the conveyance sufficient to imply a condition.[27] Indeed, even the use of the word "condition" may not be sufficient to create a condition.[28] On the other hand, California courts have more than once declared that no express language of forfeiture is necessary in order to create a right of entry,[29] although such language is always used by careful draftsmen.[30]

The tendency to adopt a construction giving narrow scope to the condition has been manifested in several ways. Thus a condition requiring a particular use has been held to be performed if the use has continued for a reasonable time.[31] And particular language has been held to indicate that the condition was to be for the benefit of the grantor personally, and so was intended to continue only during his lifetime.[32]

But by far the most significant restrictive interpretation of conditions inserted in conveyances of subdivision lots is that which regards the restriction as intended only for the benefit of other land in the vicinity retained by the grantor.[33] If that construction is adopted,

[25] CAL. CIV. CODE § 1442. Although this section appears in the Code in Division 3 on Obligations and not in Division 2 on Property, it has many times been cited by the California courts as if applicable to conveyances of real property. To this effect, see the following: Mitchell v. Cheney Slough Irr. Co., 57 Cal. App. 2d 138, 134 P.2d 34 (1943); Aller v. Berkeley High School, 40 Cal. App. 2d 31, 103 P.2d 1052 (1940); Wedum-Aldahl Co. v. Miller, 18 Cal. App. 2d 745, 64 P.2d 762 (1937); Hasman v. Union High School, 76 Cal. App. 629, 245 Pac. 464 (1926); Whitaker v. Regents of the University of California, 39 Cal. App. 111, 178 Pac. 308 (1918).

[26] Fitzgerald v. County of Modoc, 164 Cal. 493, 129 Pac. 794 (1913).

[27] Hawley v. Kafitz, 148 Cal. 393, 83 Pac. 248 (1905); Behlow v. Southern Pac. Ry., 130 Cal. 16, 62 Pac. 295 (1900).

[28] See Victoria Hospital Ass'n v. All Persons, 169 Cal. 455, 147 Pac. 124 (1915).

[29] See Rosecrans v. Pacific Elec. Ry., 21 Cal. 2d 602, 134 P.2d 245 (1943); Fitzgerald v. County of Modoc, 164 Cal. 493, 129 Pac. 794 (1913); Papst v. Hamilton, 133 Cal. 631, 66 Pac. 10 (1901); Taylor v. Continental So. Corp., 131 Cal. App. 2d 267, 280 P.2d 514 (1955). But compare Hasman v. Union High School, 76 Cal. App. 629, 245 Pac. 464 (1926).

[30] See a suggested form for a condition subsequent with right of entry in 7 HASTINGS L.J. 101 (1955). It should be noted that words of reverter are entirely unnecessary in the creation of a determinable fee with possibility of reverter.

[31] Booth v. County of Los Angeles, 124 Cal. App. 259, 12 P.2d 72 (1932) (performance for 32 years); Hasman v. Union High School, 76 Cal. App. 629, 245 Pac. 464 (1926) (performance for 29 years). But compare Rosecrans v. Pacific Elec. Ry., 21 Cal. 2d 602, 134 P.2d 245 (1943).

[32] Savanna School Dist. v. McLeod, 137 Cal. App. 2d 491, 290 P.2d 593 (1955).

[33] See, for example, Alexander v. Title Ins. & Trust Co., 48 Cal. App. 2d 488, 119 P.2d 992 (1941), and discussion in this paper under subdivision 4, *infra*.

then, as soon as the grantor has parted with the other land for the benefit of which the condition was created, the condition is at an end. It would seem that, if the condition is drawn in the form already indicated in this paper as typical—namely preceded by restrictive covenants, after which the condition is to the effect that all such covenants are also conditions—this construction is inevitable. For, it is regularly held, in this state, that equitable restrictions in the form of covenants must be for the benefit of particularly designated land. And if the covenants are for the benefit of other lands, then the conditions would necessarily be intended to benefit the same lands. Thus, as is more fully developed in the discussion which follows,[34] it will generally be true that, as soon as the subdivider has disposed of all his lots the conditions are no longer enforceable.

Finally, even though the court is obliged to construe the language as creating a condition, and even though the narrowest possible construction of its scope has been adopted, the court may still refuse to recognize a forfeiture because the grantor, by his conduct, has waived the breach or is estopped to enforce it.[35] This may be because he has permitted a breach of precisely the same condition which was inserted in other lots in the subdivision,[36] or because he has, contrary to his representations, conveyed other lots in the subdivision freed from the condition.[37] It is easy to see why such facts may show waiver or estoppel in the case of enforcing equitable restrictions in the nature of covenants. But it is arguable that the way in which other lots in the subdivision are dealt with should be immaterial on a question of the enforcement of a condition inserted in the conveyance of a particular lot. That, however, is not the way the California courts have looked at it. And, indeed, if it can be said that the condition, by its terms, only continues so long as the corresponding covenant is enforceable, then this conclusion is inescapable.

It should be pointed out that under California decisions, a right of entry may terminate because of changed circumstances in the same manner as an equitable servitude. This characteristic, however, would seem to render it *more* valuable as a device in subdivision development, not *less* valuable. For, if circumstances have so changed that it

[34] See subdivision 4, *infra*.

[35] Atkins v. Anderson, 139 Cal. App. 2d 918, 294 P.2d 727 (1956); Townsend v. Allen, 114 Cal. App. 2d 291, 250 P.2d 292 (1952); Alexander v. Title Ins. & Trust Co., 48 Cal. App. 2d 488, 119 P.2d 992 (1941); Wedum-Aldahl Co. v. Miller, 18 Cal. App. 2d 745, 64 P.2d 762 (1937); Bernstein v. Minney, 96 Cal. App. 597, 274 Pac. 614 (1929); Brown v. Wrightman, 5 Cal. App. 391, 90 Pac. 467 (1907).

[36] Wedum-Aldahl Co. v. Miller, 18 Cal. App. 2d 745, 64 P.2d 762 (1937).

[37] Maderis v. Pattavina, 46 Cal. App. 2d 615, 116 P.2d 495 (1941); see Brown v. Wrightman, 5 Cal. App. 391, 90 Pac. 467 (1907).

is unreasonable to enforce the condition, then it ceases to be of value to maintain the character of the subdivision, and becomes merely a clog on alienability of all lots subject to it. As is subsequently pointed out, this doctrine enables the lot owner to get rid of the clog.[38]

In spite of the hostility of the courts toward forfeitures, there is a substantial number of California decisions which have recognized the validity of conditions subsequent and have approved forfeitures thereunder.[39] Moreover, decisions can be found in which the defense of waiver or estoppel has been denied.[40] A leading case in which a forfeiture was held to be justified is *Rosecrans v. Pacific Elec. Ry.*[41] There the deed provided for a number of conditions in connection with the grant of a railroad right of way, continuing with the following:[42]

> The aforesaid right of way is granted upon the further *express* condition that the second party or his assigns shall establish and *maintain* over the railway to be constructed as hereinbefore provided, a daily service of not less than 18 local passenger cars or passenger trains each way; . . . Each of the conditions hereinbefore stated . . . is hereby declared to be a condition and not a personal covenant.

Then followed express language of forfeiture for breach. The court held that the deed created a condition and not a covenant and that it was not performed by operating trains in the manner stated for a period of more than thirty years. From this and other decisions in this state, it is fair to conclude that the hostility of the courts toward forfeitures does not preclude their availability as devices to restrict the use of land.

3. *Are the Legal Sanctions Appropriate?*

Are the modes provided by law for enforcing the condition subsequent or special limitation on behalf of the owner of the right of entry or possibility of reverter appropriate to accomplish his purpose? In the case of land use restrictions to maintain the standards in a subdivision, a forfeiture will rarely accomplish what is desired. Rather in such a case the interested parties want specific performance by the

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[38] See 5 (b) (iii), *infra.*

[39] To that effect are the following: Parry v. Berkeley Hall School Foundation, 10 Cal. 2d 422, 74 P.2d 738, 114 A.L.R. 562 (1937); Quatman v. McCray, 128 Cal. 295, 60 Pac. 855 (1900); Parsons v. Smilie, 97 Cal. 647, 32 Pac. 702 (1893); Liebrand v. Otto, 56 Cal. 242 (1880); Biescar v. Czechoslovak-Patronat, 145 Cal. App. 2d 133, 302 P.2d 104 (1956); Faus v. Pacific Elec. Ry., 146 Cal. App. 2d 370, 303 P.2d 814 (1956); Firth v. Los Angeles Pac. Land Co., 28 Cal. App. 399, 152 Pac. 935 (1915).

[40] Quatman v. McCray, 128 Cal. 295, 60 Pac. 855 (1900); Los Angeles L. & W. Co. v. Kane, 96 Cal. App. 418, 274 Pac. 380 (1929).

[41] 21 Cal. 2d 602, 134 P.2d 245 (1943).

[42] *Id.* at 604, 134 P.2d at 246.

fee owner. This is, of course, exactly what can be accomplished with the equitable servitude in the nature of a covenant. But there is no such thing as going into equity to compel the grantee to perform a condition. The right of entry or possibility of reverter simply has the effect of holding a club over the head of the grantee and saying: If you do not perform, you lose your property.[43] This may, of course, be a very effective club. But if the grantee violates the condition, the grantor has no practical alternative but to receive the property back. Indeed, if the possibility of reverter had been used, the grantor could not even elect not to forfeit; the title comes back whether he wants it or not. Though, in the case of the right of entry, the grantor, as a matter of law, has the election to take the property back or not, his situation is not much better. For if he does not elect to forfeit, he may well be held to have waived the condition and thus left his grantee with a fee simple absolute.

4. *Can These Interests Be Held or Enforced By the Lot Owners of the Subdivision?*

Clearly the owners of the lots in the subdivision are the persons most interested in enforcing use restrictions. Yet it is elementary that rights of entry and possibilities of reverter can be created by deed only in the grantor, and not in a third party.[44] Thus, the subdivider will have these interests. But as soon as he has sold all the lots, he will cease to have any motive for enforcing the restrictions. Assuming that the deeds creating the rights of entry or possibilities of reverter can be, and are, so worded that these interests can continue to exist after the grantor has ceased to own other land in the vicinity, the subdivider might assign these interests to a trustee for the benefit of all lot owners; or an incorporated improvement association could be formed by all lot owners and these interests assigned to it.

While there may be practical objections to this procedure, the initial question to be answered is: Are rights of entry and possibilities of reverter alienable? There is no doubt about rights of entry; the California statute expressly makes them alienable.[45] Possibilities of reverter are also believed to be alienable in California, although there is no stat-

[43] *But see* CAL. CIV. CODE § 3275, which provides for relief against forfeiture under the terms of an obligation by "making full compensation to the other party." It is believed that this provision concerns only contractual obligations; *but see* Atkins v. Anderson, 139 Cal. App. 2d 918, 294 P.2d 727 (1956), where the court regarded it as applicable to a condition subsequent involved in a conveyance of land.

[44] RESTATEMENT, PROPERTY §§ 154, 155 (1936). See also, Perry v. Berkeley Hall School Foundation, 10 Cal. 2d 422, 74 P.2d 738, 114 A.L.R. 562 (1937); Alamo School Dist. v. Jones, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960).

[45] CAL. CIV. CODE § 1046.

ute or decision squarely to that effect.[46] According to the *Restatement of Property,* possibilities of reverter are alienable.[47] But there is some American authority to the contrary.[48] A California statute provides that "Future interests pass by succession, will and transfer, in the same manner as present interests."[49] But the question at once arises: Are possibilities of reverter future interests, or are they mere possibilities? It is believed that they are future interests, just as certainly as rights of entry,[50] which have been held to be devisable under this section.[51] Probably the only reason why the California statute expressly provided for the transferability of rights of entry, and said nothing about possibilities of reverter, was that at the time the statute was enacted, it was not clear whether such interests could be created at all.[52]

But, even though we get over the hurdle of alienability, as doubtless we would, the machinery of enforcing rights of entry or possibilities of reverter through a trustee or an improvement association would be somewhat cumbersome, to say the least. And, of course, it is obvious that an assignment directly to the lot owners would be wholly impracticable as a solution.[53]

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[46] See 31 CAL. JUR. 2d *Life Estates* § 37 (1956).

[47] RESTATEMENT, PROPERTY § 159 (1936).

[48] See SIMES & SMITH, FUTURE INTERESTS § 1860 (1956), where the cases are collected.

[49] CAL. CIV. CODE § 699.

[50] See Verrall, *Future Interests in California,* in 7 WEST'S CAL. CIV. CODE ANN. 1 at 13-17 (2nd vol. 1954).

[51] Johnston v. City of Los Angeles, 176 Cal. 479, 168 Pac. 1047 (1917).

[52] John Chipman Gray, in his book on the Rule Against Perpetuities, contended that, after the English statute, Quia Emptores, 12 Edw. I, c.1 (1290), there could be no such thing as a possibility of reverter. But no American case has so held, and numerous American cases recognize the existence of possibilities of reverter. As to this see GRAY, THE RULE AGAINST PERPETUITIES 712 (4th ed. 1942); SIMES & SMITH, FUTURE INTERESTS § 283 (1956); Powell, *Determinable Fees,* 23 COLUM. L. REV. 207 (1923); Vance, *Rights of Reverter and the Statute Quia Emptores,* 36 YALE L.J. 593 (1927).

[53] Practical difficulties would be experienced (a) in transferring the right of entry created by the subdivider with respect to each lot, to the owners of all the other lots in equal undivided shares; and (b) in determining how the power to forfeit should be exercised by a group of co-owners of the right of entry. Doubtless the doctrine of the English common law to the effect that a right of entry is indivisible, would not be recognized today. As to that see 3 RESTATEMENT, PROPERTY § 161, comment *g,* and Appendix, p. 27 (1936). But if a subdivider creates a right of entry in himself with respect to one lot, he cannot transfer that right of entry to all other lot owners by the same instrument; for the language by which that is attempted would be construed as an executory interest or power of appointment and would be subject to the rule against perpetuities. See RESTATEMENT, PROPERTY § 24, comments *c* and *d* (1936). *But compare* Brown v. Terra Bella Irrigation Dist., 51 Cal. 2d 33, 330 P.2d 775 (1958). Suppose, however, *X,* a subdivider, has one hundred lots in his subdivision and has already conveyed ten of these by deeds which created in the grantor a right of entry with respect to each lot conveyed. When *X,* subsequently, conveys the eleventh lot to *K,* he can assign to him an undivided

However, before assuming that the trust or the corporation can be successfully employed to give the benefit of use restrictions in the nature of rights of entry to the lot owners, reference again must be made to the line of cases to the effect that, since the restriction is for the benefit of other land in the subdivision, and since the right of entry can only be created in the subdivider, the right of entry ceases when the subdivider sells all his lots. Apparently, this doctrine is part and parcel of a general tendency apparent in the California decisions to treat rights of entry, so far as possible, like equitable servitudes. One of the strongest decisions to this effect is *Young v. Cramer*,[54] in which this statement occurs: ". . . [I]t is recognized by the law writers that the majority view is to the effect that such restrictions *and conditions* as those now before us can be enforced only by the owner of a part of the land for the benefit of which the restrictions and conditions were created." [Emphasis added.][55] In *Alexander v. Title Ins. & Trust Co.*,[56] the court, after referring to the fact that "the reversionary right is held by an entity which is not the owner of the land in the same tract and cannot claim that its right as landowner would be adversely affected as to use or value by removal of the restriction,"[57] said: "It

interest in the rights of entry as to the ten lots already conveyed. But he can not assign to *K* interests in the rights of entry involving the use of the eighty-nine lots not yet conveyed, since those rights of entry are not yet created.

But suppose the subdivider waits until all the lots have been conveyed subject to the rights of entry, and then executes an instrument conveying an undivided interest as a tenant in common in the right of entry held against each lot, to the owner of each of the other lots. The question still remains: how are the rights of entry to be enforced? Could each lot owner separately exercise his right of entry as to his undivided share and thus forfeit only that share? Clearly that would be impracticable and inequitable. In all probability the courts would not permit it. See Jameson v. Chanslor-Canfield Midway Oil Co., 176 Cal. 1, 167 Pac. 369 (1917). Would it be necessary to have the concurrence of all co-owners of a right of entry before a forfeiture could be secured? The law on this point is not clear.

What has been said about divesting some undivided interests in a lot and not others applies only to the right of entry and not to the determinable fee. If a determinable fee with a possibility of reverter is used, the determinable fee will end all at once and revest at one time in the co-owners of the possibility of reverter. This is because the owner of a possibility of reverter has no election to forfeit; if the named event happens, title revests in him whether he desires it not.

In general, as to the questions raised in this note, see 2 RESTATEMENT, PROPERTY, Appendix, p. 23 (1936); 2 POWELL, REAL PROPERTY 282 (1950); SIMES & SMITH, FUTURE INTERESTS § 264 (1956). And compare Borgwardt, *Vertical Subdivision—the Condominum*, 36 CAL. S. BAR J. 603, 611 (1961), where the author does propose that reversionary interests in a cooperative apartment of the sort he is discussing be given directly to other apartment owners, without the use of a trust or corporation to hold these interests for the benefit of apartment owners.

[54] 38 Cal. App. 2d 64, 100 P.2d 523 (1940).

[55] *Id.* at 68, 100 P.2d at 525.

[56] 48 Cal. App. 2d 488, 119 P.2d 992 (1941).

[57] *Id.* at 492, 119 P.2d at 994.

may be questioned whether such a restriction may be enforced by anyone other than the owner of part of the land for the benefit of which the restriction was imposed."[58] Other cases have indicated the same viewpoint somewhat less strongly.[59] On the other hand, in a decision of the federal court involving California use restrictions,[60] the court sharply distinguished between rights of entry and equitable servitudes, and indicated that the former existed without reference to ownership by the grantor of any adjoining land. In other California decisions, use restrictions have been held to be enforceable without any indication in the statement of facts as to whether the person bringing the action retained any adjoining land which would be benefited by the right of entry.[61] It would seem that a deed could be so drawn as to indicate expressly that the right of entry created is for the benefit of the grantor and his heirs, devisees and assigns, without regard to his ownership of any adjacent land. Certainly there is no such thing as a right of entry being "appurtenant" to other land, although an easement or servitude commonly is appurtenant. But the fact remains, that, in the light of the California decisions, the creation of a right of entry restraining the use of land in a subdivision without reference to land retained presents a difficult problem in draftsmanship.

5. *Are These Devices Likely to Tie Up Titles For an Indefinite Time?*

Up to this point, we might well say this: Though, in some respects, these devices are not too well adapted to the purpose of restricting land use in a subdivision, yet, if they are coupled with equitable servitudes, they may supplement the latter, and, in any event, can do no harm. If, however, they tie up titles indefinitely and make land unmarketable, then they should be avoided. For a number of reasons, this may be true.

(a) *Will Title Depend Upon Facts Extrinsic to the Record?*

One difficulty with the use of the possibility of reverter or right of entry, as these interests exist at common law, is that the happening of the event or condition upon which the grantee's title terminates or is terminable depends upon facts extrinsic to the record. It is, of course, everywhere recognized that, so far as possible, the state of the title to

[58] *Ibid.*

[59] See Childs v. Newfield, 136 Cal. App. 217, 28 P.2d 924 (1934); Kent v. Koch, 166 Cal. App. 2d 579, 333 P.2d 411 (1928).

[60] Los Angeles University v. Swarth, 107 Fed. 798 (9th Cir. 1901).

[61] See Firth v. Marovich, 160 Cal. 257, 116 Pac. 729, Ann. Cas. 1912 D 1190 (1911); Quatman v. McCray, 128 Cal. 285, 60 Pac. 855 (1900); Rice v. Heggy, 158 Cal. App. 2d 89, 322 P.2d 53 (1958).

land should be discoverable from the record. If the title depends upon such a fact as the erection of structures or the use of the premises for the sale of alcoholic liquors or for business purposes then we must go outside the record to ascertain this. Indeed, even an extrinsic investigation may not disclose the facts, if a prohibited use sufficient to justify a forfeiture or termination has already occurred but has ceased, so that an investigation would not now disclose it. The problem is somewhat less acute, however, in California, due to the following statute: "Where a grant is made upon condition subsequent, and is subsequently defeated by the nonperformance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors, by grant, duly acknowledged for record."[62] Of course, if this is done, and if the reconveyance is recorded, then record title will be complete in this particular. But there is no comparable statute with respect to the happening of the event named as the limitation of a determinable fee.

(b) *How Can Title Be Cleared of a Condition or Limitation Which Has Become Obsolete, If There Has Been No Breach?*

One of the objections to the use of the right of entry or possibility of reverter is that, if the restraint on land use becomes obsolete, then it is merely a clog on the title. When building restrictions—even if imposed by rights of entry or possibilities of reverter—enforce a reasonable use of the premises, purchasers are not very likely to object to them as clouds on title. But the moment the enforced use becomes unreasonable—for example, the moment the land restricted to residence uses becomes a part of a larger area devoted to business purposes—the restriction is going to be regarded as objectionable.

(i) As has already been noted, although a right of entry or possibility of reverter is essentially a contingent interest, it is not subject to the Rule Against Perpetuities in the United States.[63] California authority is in accordance with that view.[64] In several states legislation has been enacted, restricting the duration of these interests,[65] but none exists in California. Of course, it would be entirely possible to insert

[62] CAL. CIV. CODE § 1109.

[63] RESTATEMENT, PROPERTY § 372 (1944); SIMES & SMITH, FUTURE INTERESTS §§ 1238-39 (and cases therein cited) (1956).

[64] Strong v. Shatto, 45 Cal. App. 29, 187 Pac. 159 (1919). See also, Brown v. Terra Bella Irrigation Dist., 51 Cal. 2d 33, 330 P.2d 775 (1958) and Alamo School Dist. v. Jones, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960). Other California cases could be cited in which a right of entry which might not vest within the period of the rule against perpetuities was held valid, but the rule against perpetuities was not mentioned. See, for example, Rosecrans v. Pacific Elec. Ry. Co., 21 Cal. 2d 602, 134 P.2d 245 (1943).

[65] These statutes are discussed in SIMES & TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 205-213 (1960).

in the creating deed a provision to the effect that the right of entry or possibility of reverter should come to an end after a stated period of time—say forty or fifty years.

(ii) If the owner of the right of entry or possibility of reverter could be found, the owner of the fee simple might buy him out and secure a release. For whatever question there may be in other states about the alienability of these interests, they are held to be releasable to the fee simple owner;[66] and, in California, the statute which makes them transferable would make them releasable. If the owner of the right of entry or possibility of reverter has died intestate, his heirs could execute a release of the interest. But how would the heirs be determined? According to the preferred view in the United States, a right of entry or possibility of reverter passes by descent in the same way as a possessory fee simple.[67] There is little doubt but that these interests would pass thus by descent in California,[68] although there are a very few decisions in other states to the effect that they pass "by representation," and thus a group different from those who inherit a fee simple in possession would have the power to execute a release. But even if the appropriate group to execute the release can be found without difficulty, the persons constituting it will probably expect to be paid something for the release, and thus the owner of the fee simple has in effect been forced to buy in an outstanding encumbrance.

(iii) Can the doctrine of changed circumstances be applied to terminate an obsolete right of entry or possibility of reverter? It has long been recognized in California and elsewhere,[69] that an equitable servitude is rendered unenforceable and void, if a change in the circumstances of the surrounding neighborhood makes it inequitable to enforce it; and that, in such a case, a court of equity will quiet the title in the grantee freed from the restriction. Outside of California, there has been little tendency to apply this doctrine to the termination of rights of entry.[70] It is true, here as elsewhere, if the change in circumstances has been brought about by the affirmative acts of the person holding a right of entry, he may be held to have waived it or to be estopped from asserting it. But the California decisions go further, and, regardless of whether the grantor may or may not have been to blame for the change in circumstances, have recognized that the court

[66] RESTATEMENT, PROPERTY § 161, comment *c* (1936).

[67] RESTATEMENT, PROPERTY § 164, comment *c* (1936); 1 AMERICAN LAW OF PROPERTY § 4.74 (1952).

[68] CAL. CIV. CODE § 699, and see note 50, *supra*. But compare Upinton v. Corrigan, 151 N.Y. 143, 45 N.E. 359, 37 L.R.A. 794 (1896).

[69] Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782 (1931); 2 AMERICAN LAW OF PROPERTY § 9.39 and cases therein cited (1952).

[70] SIMES & SMITH, FUTURE INTERESTS § 1992 (1956).

can declare the right of entry terminated.[71] In *Strong v. Shatto*,[72] perhaps the first case in which the point was raised in this state with respect to a right of entry, the court sought to differentiate building restrictions in equitable servitudes from those arising from conditions subsequent, and indicated that only the former could be terminated by the changed circumstances doctrine. But in a retrial of the same case, with a substituted complaint by another lot owner, the trial court found that the changes in circumstances were not sufficient to justify a holding that the conditions had terminated. The supreme court, while recognizing the doctrine of changed circumstances, felt obliged to affirm the trial court because of the findings of fact which it had made.[73] In the concurring opinion, as well as in a decision four years later, the court recognized that the result in *Strong* would no longer be reached because of procedural changes in the law, and that the doctrine of changed circumstances is to be applied to rights of entry in a proper case.[74]

It would seem that, in this state, the doctrine of changed circumstances can be relied upon to avoid much of the objection that obsolete conditions subsequent become a serious defect in the title. Of course, the changed circumstances are facts outside the record; and in order to make a clear record title, something in the nature of a quiet title suit would have to be brought.

Whether the California courts would apply the changed circumstances doctrine to the possibility of reverter has not been determined. It may be argued that it would be more difficult to do this with respect

[71] Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782 (1931); Hirsch v. Hancock, 173 Cal. App. 2d 745, 343 P.2d 949 (1959); Atkins v. Anderson, 139 Cal. App. 2d 918, 249 P.2d 727 (1956) (as pointed out in LEACH & LOGAN, CASES ON FUTURE INTERESTS AND ESTATE PLANNING 59-63 (1961), this appears to be an executory interest void under the Rule Against Perpetuities, but apparently neither court nor counsel were aware of this); Townsend v. Allen, 114 Cal. App. 2d 291, 250 P.2d 292 (1952), noted in 42 CALIF. L. REV. 194 (1954) (also put on ground that intended for benefit of lands of grantor later disposed of); Wedum-Aldahl Co. v. Miller, 18 Cal. App. 2d 745, 64 P.2d 762 (1937) (also put on ground of waiver and estoppel); Forman v. Hancock, 3 Cal. App. 2d 291, 39 P.2d 249 (1934); Letteau v. Ellis, 122 Cal. App. 584, 10 P.2d 496 (1932); Wilshire Oil Co. v. Star Petroleum Co., 93 Cal. App. 437, 269 Pac. 722 (1928). In the following cases, the principle was recognized, but the court concluded that the change in circumstances was not sufficient to justify a holding that the condition had terminated: Strong v. Hancock, 201 Cal. 530, 258 Pac. 60 (1927); Rice v. Heggy, 158 Cal. App. 2d 89, 322 P.2d 53 (1958); Faus v. Pacific Elec. Ry., 146 Cal. App. 2d 370, 303 P.2d 814 (1956); Biescar v. Czechoslovak-Patronat, 145 Cal. App. 2d 133, 302 P.2d 104 (1956).

[72] 45 Cal. App. 29, 187 Pac. 159 (1919).

[73] Strong v. Hancock, 201 Cal. 530, 258 Pac. 60 (1927).

[74] See concurring opinion of Mr. Justice Shenk in Strong v. Hancock, 201 Cal. 530, 553, 258 Pac. 60, 70 (1927), cited with approval in Hess v. Country Club Park, 213 Cal. 613, 615, 2 P.2d 782, 783 (1931).

to such an interest than in the case of a right of entry.[75] On the other hand, it is equally desirable to get rid of possibilities of reverter when they become obsolete as restraints on use. It would appear that rewriting the terms of a reversionary interest by judicial action should be no more difficult than rewriting the terms of a covenant inserted in a deed, when either interest has become obsolete.

Conclusion

While in some respects the right of entry, and perhaps also the possibility of reverter, is better adapted to the imposition of use restraints in a subdivision development in California than in most other states, the subdivider should, in most cases, be satisfied with the equitable servitude to accomplish his ends. For the equitable servitude, if set up with careful draftsmanship, can enable every lot owner in the subdivision to enforce restrictions on every other lot owner; but it is not easy to confer these same benefits satisfactorily by means of rights of entry or possibilities of reverter. Even if this should be accomplished, the mode of enforcement, by forfeiture or divestment, seems inappropriate. But most important of all, the right of entry or possibility of reverter may survive its usefulness, and live on only as a clog on the alienability of real property.

[75] See Goldstein, *Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land*, 54 HARV. L. REV. 248, 271-75 (1940), where the author regards it as somewhat more difficult to apply the doctrine of changed circumstances to possibilities of reverter, but indicates that it would be desirable to do so.